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No. 89-1500

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1990

BUSINESS GUIDES, INC.,

Petitioner,

vs.

CHROMATIC COMMUNICATIONS ENTERPRISES,
INC. and MICHAEL SHIPP,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONER ON THE MERITS

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QUESTION PRESENTED

Under Federal Rule of Civil Procedure 11, may a represented party be sanctioned and its case dismissed for submitting erroneous information to the district court when it believed, in good faith, in the accuracy of such information based on an examination of its business records?

PARTIES

In addition to the parties named in the caption, pursuant to Rule 28.2 petitioner identifies the following parties which may have an interest in the outcome of the petition: Lebhar-Friedman, Inc. (parent of petitioner); Chain Store Publishing Corp. (corporate affiliate of Lebhar-Friedman, Inc.); and Largo Music, Inc. (corporate affiliate of Lebhar-Friedman, Inc.).

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BRIEF OF PETITIONER ON THE MERITS

OPINIONS BELOW

The February 16, 1990 decision of the United States District Court for the Northern District of California is reprinted in the appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a-2a. The December 21, 1989 opinion of the United States Court of Appeals for the Ninth Circuit is reported at 892 F.2d 802 and is reprinted at Pet. App. 3a-26a. The August 5, 1988 decision of the United States District Court for the Northern District of California is reported at 121 F.R.D. 402 and is reprinted at Pet. App. 27a-34a. The April 12, 1988 decision of the United States District Court for the Northern District of California is reported at 119 F.R.D. 685 and is reprinted at Pet. App. 35a-46a. The September 14,

1987 Magistrate's revised report and recommendation is reprinted at Pet. App. 47a-63a. The April 3, 1987 Magistrate's report and recommendation is reprinted at Pet. App. 64a-81a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1989. The jurisdiction of this Court was invoked under 28 U.S.C.A. § 1254(1) (West Supp. 1990). The petition for a writ of certiorari was granted on June 25, 1990.

RULE AND STATUTE INVOLVED

The Federal Rule of Civil Procedure at issue is Rule 11, which provides in pertinent part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of any attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleadings, motion, or other paper, including a reasonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983).

The federal statute involved is the Rules Enabling Act, 28 U.S.C.A. § 2072 (West Supp. 1990), which provides:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(Added Nov. 19, 1988, P.L. 100-702, Title IV, § 401(a), 102 Stat. 4648.)

STATEMENT OF THE CASE

A. Statement of the Legal Issue Presented

This petition asks the Court to decide whether, under Federal Rule of Civil Procedure 11, district courts may require litigants to conform to objective standards of competence, a requirement heretofore reserved for counsel. Petitioner submits that the answer must be no; that, instead, federal courts may only reasonably expect – and properly demand – that represented clients act in good faith and disclose the entire truth in all proceedings. Requiring attorneys to meet a higher standard, variously described as a baseline of “professional competence”¹ or “objective” reasonableness, reflects the fact that lawyers, as professionals and officers of the court, have special responsibilities in the conduct of litigation. A rule which insists that clients act in good faith, but allows them to rely on their counsel for advice as to proper pre-filing inquiries and other matters of litigation procedure, recognizes that lawyers, not laypersons, are the

¹ *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1474 (2d Cir. 1988), *rev'd in part sub nom on other grounds, Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456 (1989).

most appropriate "gatekeepers"² to the orderly operation of our courts. In their dual role as advocate and court official, it is the responsibility of members of the bar to ensure that only legally and factually plausible claims or defenses are litigated. While sanctioning lawyers for objectively unreasonable behavior thus promotes professionalism and deters meritless claims, no such salient purposes justify sanctioning the client who, although acting in good faith, turns out to be wrong.

Furthermore, construing Rule 11 to allow sanctions, including fee-shifting, against represented parties for mere negligence would violate the Rules Enabling Act, 28 U.S.C.A. § 2072 (West Supp. 1990). It is for Congress, not the courts, to determine how the "burdens of litigation"³ should be allocated. Further, the Ninth Circuit's broad interpretation of Rule 11 would "abridge, enlarge or modify" federal and state laws specifically addressing liability for errors in litigation, all under the guise of a rule of procedure. Such needless judicial "legislation" exceeds the authority delegated by Congress to this Court under the Enabling Act.

B. Statement of Facts⁴

Petitioner Business Guides, Inc. was sanctioned under Rule 11 because it signed and filed papers in the district court which, unfortunately for all concerned, contained factual errors. Although petitioner relied in good faith on the accuracy of a business record in preparing its lawsuit, undertook on its own initiative to confirm the information contained therein, and conveyed all the facts as it believed them to be to

² See note 25 and accompanying text, *infra*.

³ *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

⁴ In accordance with Rule 24, we use the following citation form: citations to the Joint Appendix are listed as "J.A. page no.", citations to the Record are listed as "R. docket no., page no." and citations to materials contained in the appendix to the petition for certiorari are listed as "Pet. App. page no.".

its counsel, Business Guides nevertheless was required to pay respondents' attorneys' fees and had its case dismissed, because the district judge believed that it had failed to conduct an objectively reasonable inquiry. The facts underlying this severe sanction could be characterized as a comedy of errors, but for the all-too-serious chain of events which they triggered. Nevertheless, what emerges from a recitation of the following facts is that the errors made were entirely innocent.

Business Guides is a subsidiary of Lebhar-Friedman, Inc., a publisher of trade journals and magazines. Business Guides publishes directories of various businesses, including a directory of computer and software retailers ("Directory") which contains thousands of business listings laboriously compiled through written questionnaires and follow-up research. (J.A. 34-39, 50, 53-55) In 1986, Business Guides discovered facts which it believed demonstrated that respondents had copied information from its Directory. After conveying these facts to its former counsel, the now-dissolved firm of Finley, Kumble, Wagner, Heine, Unterberg, Manley, Myerson & Casey ("Finley Kumble"), and on Finley Kumble's advice, Business Guides authorized the firm to prepare and file a complaint and seek a temporary restraining order to restrain respondents from publishing and selling directories containing copied material. (J.A. 95-98, 194-99) The specific paper for which Business Guides was sanctioned⁵

⁵ As set forth at pp. 16-17, *infra*, Business Guides alone ultimately was sanctioned for papers prepared by Finley Kumble. Before the district court concluded its Rule 11 proceedings, Finley Kumble filed for bankruptcy and respondents withdrew their request for sanctions against the law firm. (R.77; R.80; Pet. App. 28a) Accordingly, the district court was left to impose sanctions, if at all, only against the represented party. Not only was this procedure at odds with the assumption of courts and commentators that "if sanctions are imposed, they will be imposed on the lawyer," American Judicature Society, *Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* 30 (Burbank, Reporter 1989), see pp. 21-23, *infra*, but it also prevented the

(Continued on following page)

was a declaration prepared by Finley Kumble and signed by one of Business Guide's employees, Michael Lambe, detailing what Mr. Lambe believed in good faith to be the listings which had been copied. (J.A. 86-89; Pet. App. 26a)

The reasons for the errors contained in Mr. Lambe's declaration are somewhat involved, but relate to the faulty (and, in hindsight, ill-advised) preparation of a business record, known as a "master seed list" (J.A. 131-146), nearly two years before the underlying action was filed. Mr. Lambe relied on the accuracy of that business record in executing his declaration. Business Guides was sanctioned because, according to the district court, Mr. Lambe *should have discovered* that the business record was inaccurate, but did not. (Pet. App. 32a, 42a)⁶

As may be discerned from its title, Business Guides' "master seed list" is a list of intentionally incorrect information which is planted in its directories to detect copying. The use of such "seeds" is common among publishers of directories, telephone books and atlases. Business Guides uses two types of seeds. "Type A" seeds are listings of businesses

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court from weighing the conduct of petitioner's *counsel* in relation to petitioner's actions. The practical consequence of this procedure was to allow "fee-shifting" under the guise of a rule directed primarily at conduct of the bar. See pp. 40-48, *infra*.

⁶ Although the question of whether Mr. Lambe in fact was negligent is not dispositive of the issues presented in this proceeding, it bears noting that it took three separate hearings and three sets of counsel to uncover the problem with the seed list that the court believed Mr. Lambe should have discovered himself. (Pet. App. 48a) See also note 29, *infra*, for a discussion of the reasons why courts traditionally rely, as did Mr. Lambe, on the accuracy of business records.

which do not exist at all.⁷ "Type B" seeds are partially altered listings which contain minor errors such as transposed numbers in an address or zip code or misspelled names. The appearance of one or more seeds in a competitor's publication is considered strong evidence of copyright infringement. (J.A. 105-6, 161)

In the normal course of its business, Business Guides compiles and maintains master seed lists for each type of directory it publishes. These documents identify each Type A and B seed which appears in the particular directory. The seed lists are stored by the company in a secure vault. Normally, the seed lists are prepared prior to publication, and the seeds are inserted just before final printing. (J.A. 105-6, 161; R.71, 33-36)

Concerned that its 1984 Directory did not contain enough seeds, Business Guides created its 1984 master seed list in a unique and, as it turned out, faulty manner. In addition to intentionally planting incorrect information, Business Guides decided to augment its "seed" list by identifying and listing as Type B seeds the typographical errors which inevitably occur as a result of the tedious process of gathering, editing and printing thousands of separate informational listings.⁸ Accordingly, Business Guides directed one of its employees, Victoria Burdick, to locate the typographical errors which had found their way into its 1984 Directory and

⁷ One of these Type A seeds, "NFR Computer Room," an entirely fictitious listing made up by Business Guides, appeared in respondents' 1985 directory. This company was created from the initials of the daughter of one of Business Guides' employees (Nicole F. Rossini), and the listed address actually was that employee's home address. (J.A. 174-180)

⁸ Business Guides' directories list thousands of different companies. These listings, which typically contain a name, telephone, address and short description of each business, fill hundreds of printed pages. (J.A. 50; R.12) Thus, a few typographical errors in the final printing are virtually inevitable.

expand the seed list for that directory, post-publication. (J.A. 163-164) In theory that was a fine idea.

Ms. Burdick was told to compare the printed 1984 directory with the initial information sheets (or questionnaires) used by Business Guides to compile information about the companies to be listed. Whenever she found a discrepancy, she listed the information *printed in the directory* as a Type B seed (*i.e.* as being incorrect information). *Id.* The problem with this approach, however, was that it was based on the unknowingly flawed assumption that all of the information in the questionnaires was correct, so that any discrepancy represented an error in the printed volume. In fact, however, the information appearing in the final directories often had been corrected or revised in the editing and proofreading process leading up to final publication, *but without modifying the original questionnaires themselves.* (J.A. 169, 184-185)

Hindsight is, of course, twenty-twenty. The method employed by Ms. Burdick led to a 1984 master seed list which listed as purported Type B "seeds" a number of entries that, in fact, were *accurate*. That being the case, the presence of "seeded" information in a competitor's publication would not (contrary to Business Guides' intentions and belief) evidence copying at all. That fact remained hidden like a land mine waiting for Business Guides to take a crucial misstep.

The faulty preparation of the 1984 master seed list remained unknown to Business Guides at the time it filed the underlying action. In fact, the district court expressly noted that Business Guides did not even understand the significance of the faulty preparation of the list until its present counsel explained it to representatives of the company *and to the court*, long after the complaint and TRO papers in this action were filed and sanctions originally imposed. (Pet. App. 57a-59a) Up until that time, Business Guides believed in good faith that respondents had copied the seeds listed in its seed list and that the appearance of the seeds in respondents' publication therefore evidenced copyright infringement. (J.A. 190; Pet. App. 48a, 53a)

Business Guides first suspected respondents of copying information from its directories in 1985 when a Type A (wholly fictitious) seed was found in respondents' 1985 directory. (J.A. 185)⁹ Those suspicions were heightened in 1986, when respondents published a diskette version of their computer directory. The diskette contained eight additional Type B seeds from the 1984 master seed list, and one Type B seed from the 1986 master seed list (J.A. 33-34, 185-86, 196-97)¹⁰ At this point, Business Guides contacted Finley Kumble, which for years had been the company's copyright counsel, and discussed the appearance of these ten "seeds" in respondents' directories. Finley Kumble neither asked its client to explain what made the specific inaccuracies in the ten listings "seeds," nor did it verify (or request Business Guides to verify) the information contained in the company's business records. (J.A. 106, 186-187, 189) Instead, Finley Kumble advised Business Guides that it had good grounds to file a lawsuit against respondents for copyright infringement, conversion and unfair competition. Business Guides accordingly authorized the initiation of such an action. (J.A. 196-99)

The October 31, 1986 complaint and TRO papers¹¹ filed by Finley Kumble on petitioner's behalf are best described as cursory. Finley Kumble did not even attempt to explain to the court the way in which any of the alleged inaccuracies in the ten business listings (conclusorily characterized as "seeds") were, in fact, inaccurate. That omission predictably led the

⁹ See note 7, *supra*.

¹⁰ The 1986 master seed list (J.A. 155-59), unlike the 1984 list, was prepared in the routine manner; that is, all of the seeds were intentionally planted before publication. (J.A. 155-59) One of the type B seeds from that list also appeared in respondents' 1986 diskette (J.A. 79, 109; R.71, 88, 114; Pet. App. 72a), and has not been explained by respondents in any of its filings to date.

¹¹ Finley Kumble's initial application sought both a TRO and a preliminary injunction restraining respondents from marketing their directory. (J.A. 8-21)

district judge's law clerk to call Finley Kumble and request details regarding the incorrect information in the ten "seeds." (J.A. 121; Pet. App. 65a-66a)

Only then (November 4, 1986) did Finley Kumble first ask its client for any details about the seeds. The inquiry from counsel was directed to Mr. Lambe, a relatively junior employee in charge of research. (J.A. 121, 187) Mr. Lambe was involved in the decision to file suit against Chromatic and was, of course, generally aware of the seeding process. However, he had not been involved in the preparation of the 1984 master seed list and knew nothing about the unusual way in which it had been prepared. (J.A. 186-87, 192-93)

In the short time available to him (the TRO hearing was scheduled for November 7, 1986), Mr. Lambe reviewed the 1984 master seed list and provided Finley Kumble with the requested details as listed therein. In addition, *and entirely on his own initiative*, Mr. Lambe decided to attempt to verify the information which had been submitted to the court. He checked subsequent business directories to ascertain whether seeds had been corrected in those later publications. To verify the Type B seeds containing altered telephone numbers or addresses, he checked telephone books for listed local businesses and zip code directories for out-of-town businesses. Mr. Lambe also thought to check the questionnaires themselves, but they were stored in an out-of-town warehouse and could not be retrieved before the TRO hearing. However, as ultimately proved dispositive in the opinion of the district and circuit courts, Mr. Lambe did not think to telephone representatives of the ten businesses to verify the seeds itemized in the complaint and TRO papers. (J.A. 187-190; R.71, 38-40)

As a result of the checking he was able to do, Mr. Lambe became uncertain about four of the seeds and requested Finley Kumble to withdraw them. He believed that he had verified three of the other seeds. Mr. Lambe was not able to

corroborate the remaining three seeds but, as he testified, he felt that he had no reason to doubt them. (J.A. 187-90; R.71, 37-40)¹²

¹² Mr. Lambe's continuing, if ill-advised, belief in the validity of Business Guides' action after he had withdrawn the four seeds was influenced by three factors. *First*, to Mr. Lambe's mind, the appearance of the wholly fictitious (or "Type A") "NFR Computer Room" seed in respondents' directory was plain and irrefutable evidence of copying. (J.A. 189-90; R.71, 39-40)

Second, as Mr. Lambe testified, Business Guides had "never had difficulty with master seed lists before and we'[d] either been involved directly in litigation or threatened litigation, and we never had a problem with them." (R.71, 39) Indeed, Business Guides had just succeeded in forcing a subsidiary of Xerox Corporation to admit to copying and to stipulate to an injunction and the payment of damages based on evidence derived from the 1984 master seed list. (J.A. 95-96, 106)

Third, Mr. Lambe had no idea that there was any basis to question the integrity of the 1984 master seed list until *after* the TRO hearing. Thus, he testified:

Q. Is it your recollection that the only questions that were raised, at least as far as you knew, prior to the time when that hearing was held and your application for an injunction was denied were questions about what the seeds meant rather than any questions about whether they were valid?

A. That's my recollection.

Q. Okay.

A. And I would think that had I heard about the invalidity of them, I would have started doing some independent checking myself.

Q. Okay. In fact, the first time you knew that a question of validity had been raised was on the Saturday after the hearing when your lawyers let you know what had happened; is that right?

A. Yes, blue Saturday.

(R.71, 45-46)

Finley Kumble explained to Mr. Lambe that, in light of the law clerk's request for further information, it would be necessary to prepare a supplemental declaration setting forth details regarding the remaining six seeds. However, Finley Kumble did not forward a draft of that declaration to Mr. Lambe for his review *until the morning of the TRO hearing*.¹³ (J.A. 108, 188) Even then, the declaration contained one of the four seeds Mr. Lambe had specifically requested counsel to withdraw. (J.A. 188-89) Mr. Lambe carefully reviewed his declaration in the time he had before the hearing was to begin, and crossed out in ink the "seed" Finley Kumble had neglected to withdraw. He then signed the declaration under penalty of perjury, believing in good faith in its accuracy

¹³ Petitioner argued below that, due to the short amount of time Mr. Lambe had to review and verify his declaration – only a few hours – his conduct was objectively reasonable under the circumstances (in addition to being subjectively reasonable). Petitioner cited to the statement of the Rules Advisory Committee that "what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer." Fed. R. Civ. P. 11 Advisory Committee Note. The Ninth Circuit rejected that contention, stating: "[T]he argument is curious that when a party is facing its self-imposed deadline [the date of the TRO hearing], it is excused from what would otherwise be unreasonable." (Pet. App. 22a-23a) This response, however, ignores the fact that counsel could have drafted a declaration detailing the information in the seeds at any time before filing the complaint – or at any point thereafter prior to the TRO hearing – but only prepared the declaration as a result of a request by the court and only submitted the document to Mr. Lambe for his review hours before the TRO hearing, telling him that it was urgent that he sign and return it immediately. (J.A. 108, 188) In short, the time restrictions were by no means "imposed" by Business Guides or Mr. Lambe. Moreover, it is particularly unfair to suggest that Mr. Lambe somehow controlled, let alone manipulated, the process. That ignores the reality of corporate life. Mr. Lambe was a mid-level officer responding to urgent requests from his employer's corporate counsel. Those are not circumstances that encourage second-guessing.

(J.A. 190), and counsel telecopied the signed document from New York to San Francisco. (J.A. 108-09)¹⁴

In the meantime, the district judge's law clerk had been doing his own independent investigation. Due in part to the perfunctory pleadings filed by counsel and in part to the fact that the record had been sealed and the law clerk apparently was confused about whether respondents' attorney would have the opportunity to respond,¹⁵ the law clerk took it upon himself to telephone the companies listed in the remaining six seeds. (R.60, 13-15) When he did so, he discovered that four additional seeds in fact contained correct information. The TRO hearing, consequently, was a short one. The court refused oral argument, denied the TRO application, stayed all proceedings including discovery and referred the action to a magistrate to determine whether Finley Kumble

¹⁴ Mr. Lambe's belief that Business Guides had a strong copyright infringement case, even after the court made inquiries and he had withdrawn four of the original ten seeds, was also informed by the advice of his counsel. Michael Bamberger, the lead Finley Kumble lawyer on the case, testified in a declaration below:

I believe that on the basis of the first 'seed' [NFR Computer Room] alone, both an application and a temporary restraining order should have been justified. When the three [remaining] 'seeds' are taken together, it is clear to me that the plaintiff is correct in his allegations and the temporary restraining order could well have issued in the absence of the remaining 'seeds.'

(J.A. 110)

As we discuss, *infra*, judging the merits of a case based on a set of facts is the specialty of *lawyers*, not clients. Mr. Lambe's good faith belief that Business Guides had a meritorious case *based on the advice of his counsel* should not be cause for sanctions against the client. See pp. 22-26, *infra*.

¹⁵ Although the court signed orders directing that respondents' counsel would have access to the sealed pleadings (J.A. 57-58, 84-85), the law clerk testified that he felt he could not assume that service had been accomplished due to the eleventh-hour filing of Mr. Lambe's declaration. (R.60, 13-15)

and/or Business Guides should be sanctioned under Rule 11. (R.30; Pet. App. 64a)

Chief Magistrate Frederick Woelflen initially conducted two separate evidentiary hearings under the auspices of the Rule. Despite an apparent conflict of interest, both Finley Kumble and Business Guides were represented by the same newly-retained counsel,¹⁶ who argued that the factual errors contained in Mr. Lambe's affidavit were merely coincidental. (Pet. App. 71a) On April 3, 1987, the magistrate filed a report with the district court recommending that both Finley Kumble and Business Guides be sanctioned under Rule 11 and that the Court initiate proceedings against one of Finley Kumble's partners under Title 18 of the United States Code and Rule 42 of the Federal Rules of Criminal Procedure. (Pet. App. 73a-75a) The magistrate stated in his report that he doubted the good faith of both Business Guides and its counsel because he found it inconceivable that the factual errors in Mr. Lambe's affidavit were attributable to mere coincidence. (Pet. App. 71a)¹⁷ With respect to the law firm, the magistrate stated:

We further find it impossible to believe Finley, Kumble truly believed such remarkable facts and coincidences. We think Finley, Kumble attempted to protect an old and profitable client. Lying on the stand, under the penalty of perjury, carries advocacy too far.

(Pet. App. 74a)

¹⁶ "[There is] an inherent problem in a sanction hearing addressed to both a plaintiff and her attorneys, where the plaintiff and attorneys are not separately represented." *In re Ruben*, 825 F.2d 977, 985 (6th Cir. 1987), cert. denied sub nom, *Swan v. Ruben*, 485 U.S. 934 (1988). See also, *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1456 (2d Cir. 1988), rev'd in part sub nom on other grounds, *Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456 (1989).

¹⁷ In fact, of course, they were not; but neither Finley Kumble nor Business Guides figured that out. This unfortunate failing complicated the entire proceedings. See notes 19 and 21, *infra*.

At that point, Business Guides retained its present counsel who conducted their own investigation and uncovered the facts regarding the faulty preparation of the 1984 master seed list. Based on the results of that investigation they requested a further sanctions hearing. The court granted Business Guide's request and a new evidentiary hearing was held during which the company's misplaced reliance on the integrity of the questionnaires to create its 1984 master seed list finally was explained for the first time. (Pet. App. 48a) As a result, on September 14, 1987, the magistrate issued a revised report and recommendation in which he found, contrary to his earlier belief, that Business Guides and Mr. Lambe had acted in good faith, albeit mistakenly (Pet. App. 39a-40a, 53a), and that neither Business Guides nor its counsel had taken part in any intentional misrepresentation or cover-up. *Business Guides v. Chromatic Communications Enters., Inc.*, 119 F.R.D. 685, 687 (N.D. Cal. 1988). (Pet. App. 39a-40a)¹⁸

He also found that Business Guides' lawsuit was not "interposed for any improper purpose." (Pet. App. 53a)¹⁹

¹⁸ The magistrate also noted in his revised opinion that Business Guides *had every incentive* to explain to him the significance of the manner in which the seed lists had been prepared (because that explanation would have demonstrated that its errors were innocent) but simply failed to appreciate the significance of the issue. (Pet. App. 57a)

¹⁹ The Magistrate's initial belief that Finley Kumble and Business Guides had acted in bad faith surely is understandable in light of the "coincidence" argument presented to him by former counsel. As the Magistrate stated in his revised report:

At [the first two] hearings, the parties testified plaintiff relied upon the questionnaire . . . for the information presented to the court. They testified that it was only a coincidence that the information represented to the court as incorrect seeded information . . . was actually correct. In my April 3, 1987 Report, I noted that in order for the court to believe defendant's explanation, plaintiff must be able to persuade me that [the listed] company incorrectly spelled [its manager's] name on the

(Continued on following page)

Despite the magistrate's revised determination that Business Guides had acted in good faith, he nonetheless recommended that it be sanctioned under Rule 11 for three separate reasons, only the first two of which are at issue here: *first*, for relying on the inaccurate 1984 master seed list in commencing the copyright infringement action; *second*, for submitting Mr. Lambe's declaration without a "telephone check" of the information contained in the seed list; and *third*, for presenting the "coincidence" explanation at the first two evidentiary hearings. (Pet. App. 53a-62a)

The district court adopted these findings and recommendations, unsealed the record and invited respondents to seek sanctions under the Rule. (Pet. App. 37a-46a) By this time,

(Continued from previous page)

questionnaire. More importantly however plaintiff would have had to convince me that it was merely coincidental that plaintiff chose to alter, among thousands of listings contained in the directory, first, this particular listing; second, this particular letter in the word, resulting in an alteration which turned out to be the true spelling of this man's name. I noted plaintiff asked me to believe the occurrence of a very similar coincidence in [a second] seed. I found the occurrence of two such similar and incredible coincidences impossible to believe. Accordingly, I doubted the good faith of the parties' representations and recommended sanctioning them for offering false representations in defense of Rule 11 sanctions. I also suggested that disciplinary proceedings against Finley Kumble may also be appropriate pursuant to Local Rule 110-7.

The parties then filed objections to the April 3 Report and another hearing was scheduled before me on July 5, 1987. In preparation for this third evidentiary hearing, plaintiff filed a brief and affidavits wherein it explained, for the first time, that the reason inaccurate information had been conveyed to the court stemmed from Victoria Burdick's preparation of the Master Seed List for the 1984 directory.

(Pet. App. 51a-52a)

Finley Kumble had dissolved and filed for bankruptcy. Accordingly, respondents notified the court that they would seek sanctions (in the form of their costs, attorneys' fees and compensatory damages) solely from Business Guides. (R.77; R.80; Pet. App. 28a) After briefing by both sides (but without permitting oral argument), the district court imposed monetary sanctions of \$13,865.66 (equal to respondents' purported costs and attorneys' fees) against Business Guides and, despite the existence of evidence suggesting possible infringement,²⁰ dismissed Business Guides' lawsuit (before any discovery) with prejudice. (Pet. App. 34a)²¹

Business Guides appealed. In that appeal it urged the court to adopt the standard of Rule 11 liability established by the Second Circuit in *Calloway* that while an objective (should have known) standard of reasonableness applies to the conduct of *attorneys* under Rule 11, a "subjective" (or "good faith") standard governs the conduct of *represented parties*. The Ninth Circuit declined to do so.

The Court noted initially that whether the objective or subjective standard applies to represented parties under Rule 11 was "purely a legal question" and was an "issue of first impression" in that Circuit. *Business Guides v. Chromatic*

²⁰ See notes 7 and 10, *supra*.

²¹ We believe that it is fair to observe that, despite the ultimate acknowledgment of Business Guides' (and its attorneys') honesty and good faith, the proceedings were unavoidably colored by the fact that an inadequate presentation to the chief magistrate led him originally to suspect that both Business Guides and Finley Kumble *had acted in bad faith*. See note 19, *supra*. Indeed, the district court sanctioned Business Guides for that presentation. (Pet. App. 43a-45a) Although the district court subsequently found that Business Guides in fact had acted in complete good faith – and the Ninth Circuit reversed that part of the court's order imposing sanctions for the arguments presented by counsel at the evidentiary hearings – the earlier conclusion (as well as the extensive satellite proceedings required to understand what had happened) doubtless influenced the outcome, including the district court's remarkable choice of dismissal with prejudice as a sanction.

Communications Enters., Inc., 892 F.2d 802, 808 (9th Cir. 1989). (Pet. App. 13a, 15a)²² However, based in large part on its reading of the Advisory Committee Notes and on policy arguments favoring the expanded use of sanctions in federal courts, the court of appeals held that "an objective standard of reasonableness applies to lawyers and represented parties alike." *Id.* at 812. (Pet. App. 21a) The court then affirmed the district court's finding that Business Guides failed to satisfy this objective standard in relying on the accuracy of its business records.

Because the court reversed that part of the district court's opinion imposing sanctions on the basis of conduct at the evidentiary hearings before the magistrate, it also vacated the order of sanctions, allowing the district court to reconsider its choice of penalties. (Pet. App. 26a) However, without permitting briefs or oral argument, the district court *sua sponte* issued an order on February 16, 1990, reaffirming the monetary sanctions and order of dismissal for reliance on the master seed list and for failure to conduct the telephone check which the court believed would have constituted an objectively reasonable inquiry. (Pet. App. 1a-2a) Business Guides' petition for certiorari was granted by this Court on June 25, 1990.

SUMMARY OF ARGUMENT

The Second Circuit has carefully differentiated between attorneys and their clients for the purpose of evaluating

²² This Court recently held that appellate courts generally will review Rule 11 decisions under the abuse of discretion standard. However, "if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S. Ct. 2447, 2459 (1990), quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); see also *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("If [the Court of Appeals] believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment"). Accordingly, if the Court accepts petitioner's argument that the Ninth Circuit applied the wrong rule of law, it should reverse its decision on that basis.

conduct under Rule 11. While attorneys are expected to "measure up to minimal standards of professional competence" under the Rule, the Second Circuit concluded that subjective good faith shields represented parties from sanctions for pleadings which contain errors or inaccuracies. *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1474 (2d Cir. 1988), *rev'd in part sub nom on other grounds, Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456 (1989); accord, *Cross & Cross Properties v. Everett Allied Co.*, 886 F.2d 497 (2d Cir. 1989); *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926 (2d Cir. 1989). The Ninth Circuit in this case has taken a different tack, lumping together laymen and lawyers and requiring undefined levels of "objective" competence from each. While both the subjective and objective approaches would require the imposition of sanctions on represented parties who knowingly (or recklessly) misuse the federal courts, conceal facts or present inaccurate papers, only the latter would countenance sanctions against clients who have acted mistakenly but in good faith.

There are, we submit, sound reasons to apply a less stringent standard to clients. *First*, the principal purpose of amended Rule 11 is to deter litigation misconduct while avoiding the potential to chill the legitimate assertion (or defense) of claims in federal court. Lawyers properly may be expected to sort the wheat of the legitimate from the chaff of the inaccurate. Thus, in the case of lawyers, the use of Rule 11 is likely to deter more than to chill. See, American Judicature Society, *Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* 84-85 (Burbank, Reporter 1989). The opposite is true, however, for clients, for whom the added burden of sanctions in the event they fail to conform to undefined and highly variable objective standards adds a chill incommensurate with any benefits associated with such a rule.

Second, courts are peculiarly the province of judges and lawyers, not laypersons. When a party plaintiff (voluntarily) or a party defendant (involuntarily) finds herself in federal

court, she is likely to be unfamiliar with both the requirements and the protocol of the legal process. Nevertheless, our system of justice *encourages* litigants from all walks of life to seek redress of important grievances in the courts; most fundamentally, it encourages participation in an adversary process to arrive at the truth. The punishment of bad faith and lies is consonant with these notions; the punishment of simple mistakes is not. Many traditional areas of courtroom jurisprudence – for example, the laws of perjury and of absolute and qualified immunities for testimony – reflect this critical distinction.

Third, the costs to litigants and the judicial system associated with the application of a variable objective standard of reasonableness to represented parties dwarf its prospective benefits. As the Ninth Circuit implicitly acknowledged, its proposed standard would vary “under the circumstances.” Thus, what is objectively reasonable for a plaintiff with a third grade education presumably would differ from that which is objectively reasonable for a Certified Public Accountant (with all the myriad variations required to evaluate the behavior of people from all walks of life, with all levels of sophistication and education). The costs which would be imposed on courts to undertake an investigation into those circumstances is significant, and assuredly would lead to the type of “satellite litigation” under Rule 11 that the Advisory Committee cautioned courts to avoid. *Federal Rules of Civil Procedure: Amendments to Rules*, 97 F.R.D. 165, 201 (1983) (Fed. R. Civ. P. 11 Advisory Committee Note). From the perspective of both court and litigant, the certainty and simplicity of holding clients to one understandable common denominator – good faith – makes sound practical and economic sense, and comports with the overarching mandate of Federal Rule of Civil Procedure 1 that the federal rules “shall be construed to secure the just, speedy and inexpensive determination of every action.”

Finally, the Rule 11 standard adopted by the Ninth Circuit raises serious questions regarding the scope of judicial power and rulemaking authority. Such power must derive either from the inherent authority of inferior courts or the authority vested by Congress in this Court under the Rules Enabling Act, 28 U.S.C.A. § 2072 (West Supp. 1990). It is by now settled that “inherent powers” are limited to sanctions for bad faith. And, under the Enabling Act, federal procedural rules may not confer substantive rights on parties at odds with applicable federal or state laws, nor may they “abridge, enlarge or modify” substantive rights. 28 U.S.C.A. § 2072(b). Thus, expanding the Rule to reach clients who, though negligent, act in good faith, not only fails to serve a salient purpose, but also raises serious concerns regarding the power to allocate the “burdens” of litigation through judge-made rules.

ARGUMENT

A. The Application of a Negligence Standard to Represented Parties Will Chill More Than It Will Deter

To properly interpret the text of Rule 11, it is important to consider its underlying purpose – to police the professional “guild” of attorneys who practice in the federal courts and to promote standards of competence in the conduct of litigation in those courts. Thus, commentators have stated that the “purpose[s] of the [1983] amendment [are] to create a higher standard of attorney behavior,” Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 *Judicature* 363 (1983), and “to elevate the standards of practice.” Rothschild, *Rule 11: Stop, Think and Investigate*, 11 *Litigation* 13, 54 (Winter 1985).

Lawyers, as professionals and officers of the court, are expected to conform to a minimum level of competence. If they fall below that level, their conduct is a proper concern of the courts, regardless of whether a particular attorney acted in bad faith or for an improper purpose:

[Rule 11's] standards are based on an analysis of the nature of the professional relationship. Historically, being a member of a profession has meant that an individual is some type of expert, possessing knowledge of high instrumental value such that the members of the community give the professional the power to make decisions for them. In the legal profession, the community has allowed the profession the right of self-regulation.

Section of Litig., American Bar Ass'n, *Sanctions: Rule 11 and Other Powers* app. at 202-03 (2d ed. 1988). That right of self-regulation includes the imposition of stringent academic requirements, a rigorous bar examination, continuing legal education and the power to mandate standards of professionalism in the filing of pleadings and to levy sanctions for the failure to comport with those standards.²³

It is, however, another matter entirely to impose sanctions on represented parties who fail to live up to court-imposed standards of professionalism. Represented clients generally are *not* professionals; indeed, the realm of courtroom, judge and jury is as alien to the average litigant as quantum mechanics is to the average lawyer. Consequently, imposing on laypersons standards of professional competence is more likely to confuse than enlighten and, in all events, is unlikely to alter behavior. Thus, so long as they act in good faith and tell the truth, parties should be entitled to rely on the advice of counsel as to whether they need to do more to verify facts or take other steps before, *e.g.*, initiating (or answering) a complaint. Indeed, the *duty* properly lies on counsel under Rule 11 to render such direction. See American Judicature Society, *Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* 30-31 (Burbank, Reporter 1989) (assuming that "if sanctions are imposed, they will be imposed on the lawyer. . . . Clients who are not lawyers are not bound by the rules of professional

²³ Our discussion of the power of the judiciary to levy sanctions is set forth at pp. 41-46, *infra*.

ethics."').²⁴ Cf. *Slane v. Rio Grande Water Conservation Dist.*, 115 F.R.D. 61, 63 (D. Colo. 1987) (refusing to "hold laymen responsible for fees, when it is apparent that competent counsel would have advised them that their claims are without merit."').

As officers of the court, lawyers may be expected to act as its "gatekeepers."²⁵ In that function,

²⁴ The *Lawyers' Manual on Professional Conduct* notes that, in most Rule 11 cases, the lawyer alone is sanctioned:

This may be in recognition of the lawyer's ethical duty not to prosecute frivolous claims [see Model Code of Professional Responsibility DR 7-102 (1980) and Model Rule of Professional Conduct, Rule 3.1 (1989)], or perhaps reflects the implicit view that the lawyer bears greater responsibility because the client has entrusted the case to him.

[Manual] Law. Man. on Prof. Conduct (ABA/BNA) 61:160 (1988).

²⁵ The concept of a "gatekeeper" in economic literature refers to a screening or policing function performed by someone who, for one reason or another, possesses the ability to prevent another's misconduct by withholding his cooperation. See generally, Kraackman, *Gatekeepers: The Anatomy of a Third Party Enforcement Strategy*, 2 J. L. & Econ. Org. 53 (1986). We use the term here in a similar, but not identical sense. Lawyers are, because of their position and expertise, both necessary for the judicial process to function and well-situated to prevent abuse — provided that they have incentives to do so. The latter obviously is somewhat tricky in the sense that attorneys are *paid* by and serve the interests of the very clients whose conduct they are asked to police and whose incentives may be to *violate* ethical or legal standards in order to advance their position in litigation. Compare T. Parsons, *A Sociologist Looks at the Legal Profession*, in *Essays on Sociological Theory* 370, 384 (1954) ("The lawyer functions as a kind of buffer between the illegitimate desires of his client and the social interests.") On the other hand, concern for reputation and other non-monetary values provide a counter-incentive. See Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 U. Md. L. Rev. ____ (forthcoming) at text accompanying notes 35-41. More important, so do rules, such as Rule 11, which punish attorneys for failing to act appropriately as "gatekeepers." Gilson, *supra*,

(Continued on following page)

counsel has the duty to ensure that only legally and factually plausible claims enter the courtroom. But lawyers owe duties to their clients as well,²⁶ not the least of which is to take *responsibility* for the gatekeeping function. While lawyers are trained to discern tenable from tenuous claims, laypersons are not. Laypersons are encouraged to hire lawyers,²⁷ and therefore should be able to rely on their advice as to what pre-filing investigation is prudent.²⁸

To illustrate, consider whether, if the Ninth Circuit's standard had been the law prior to the initiation of the underlying action, Business Guides would have behaved any differently; would Mr. Lambe have understood that "objective" reasonableness required him (at least in one court's opinion) to conduct a telephone check to confirm the accuracy of a business record? Petitioner submits that, by definition, a party

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text accompanying notes 79-96. While applying Rule 11 to clients can serve some prophylactic purpose, such enforcement is likely to be less cost-efficient simply because clients are less likely to understand what is required of them — particularly where the offense has no element of intended abuse associated with it.

²⁶ See Section of Litig., American Bar Ass'n, *Sanctions: Rule 11 and Other Powers* app. at 203 (2d ed. 1988) (noting lawyers' duties to clients of loyalty, diligence, competence and candor, as well as lawyers' duties to the legal system and legal profession.)

²⁷ Compare *Spainhower v. United States*, 469 U.S. 1193 (1985) (approving appointment of "shadow counsel" for *pro se* defendant).

²⁸ Indeed, the Chief Magistrate in this case found "force" to Mr. Lambe's testimony that:

Business Guides relied on Finley, Kumble to determine what evidence they were going to present and what facts they would bring to the Court's attention because they're the professionals.

(Pet. App. 60a) As Finley Kumble's chief lawyer on the case testified, it was his belief and he advised his client that Business Guides' case was meritorious even after the four seeds had been withdrawn by Mr. Lambe. See note 14, *supra*.

acting in good faith *does* attempt to act reasonably in commencing (or defending) a lawsuit.²⁹ It has an added incentive to do so: if the party brings a meritless case it must pay its own costs for nothing. Punishing that party for what someone else believes it should have done will not serve to alter behavior (except, perhaps, by over-detering people from

²⁹ Mr. Lambe's good faith presumption that his company's business records were accurate should not be surprising. Under Federal Rule of Evidence 803(6), documents "kept in the course of a regularly conducted business activity" are not excluded by the hearsay rule, even though the declarant may be available as a witness. The Advisory Committee on Proposed Rules has explained:

The element of unusual reliability of business records is said variously to be supplied by . . . actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

Fed. R. Evid. 803(6) Advisory Committee Note. In another context, this Court also has made observations pertinent to the instant case:

The routine of modern affairs, mercantile, financial and industrial, is conducted with so extreme a division of labor that the transactions cannot be proved at first hand without the concurrence of persons, each of whom can contribute no more than a slight part, and that part not dependent on his memory of the event. Records, and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents. Unless they can be used in court without the task of calling those who at all stages had a part in the transactions recorded, nobody need ever pay a debt, if only his creditor does a large enough business.

Palmer v. Hoffman, 318 U.S. 109, 112 (1943), quoting Judge Hand in *Massachusetts Bonding Ins. Co. v. Norwich Pharmacal Co.*, 18 F.2d 934, 937 (1927).

Mr. Lambe obviously did not think to call all those (including Ms. Burdick) who "had a part in the transaction recorded" nor to "prove first hand" the accuracy of the seed list by telephone verification because he thought it proper to assume that a document he believed was routinely prepared and kept for use in the ordinary course of Business Guides' business was accurate.

bringing suits at all) or provide predictable guidelines. Accordingly, it is unlikely to deter the type of error which occurred here.

Such punishment is, however, likely to chill the assertion or defense of legitimate claims. For the party unfamiliar with the legal system and constrained by the high costs of counsel, the barriers to entering the justice system already are high. Surely the additional costs of losing a lawsuit (actual attorneys' fees plus the failure to win the relief requested) is incentive enough for parties only to assert claims they reasonably believe have merit. For those who are over-zealous in their evaluation of their legal position, we have lawyers to act as "screens." That it is how the system ought to be configured.

The foregoing considerations appear to have informed the Second Circuit's decision in *Calloway*. There, the court noted that an objective standard serves the salient purpose of deterring attorney misconduct and ensuring professionalism:

As licensed professionals and officers of the court, attorneys are expected to measure up to minimal standards of professional competence under the Rule and thus may not excuse their conduct on the ground that they were acting in good faith. . . .

Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1474 (2d Cir. 1988), *rev'd in part sub nom on other grounds, Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456 (1989).

However, the Second Circuit also concluded that there are no equivalent concerns that justify the imposition of sanctions on represented parties acting in good faith, even in the case of egregious errors. In *Calloway*, the plaintiff filed sworn declarations stating that he had never affixed his signature to certain contracts at issue; that, instead, his signature had been "facsimiled" on the papers. The plaintiff later abandoned the "facsimile argument", contending instead that the contracts, though signed, had been altered. After a defense verdict, the court imposed \$100,000 in sanctions upon the attorneys and \$100,000 in sanctions against Calloway.

The Second Circuit affirmed the sanctions against the attorneys but reversed the award against Calloway, noting that Calloway had relied upon his counsel in formulating the facsimile argument, and that "Calloway did not knowingly lie in the affidavit that was written by [his former attorney and] had not acted in bad faith." *Calloway*, 854 F.2d at 1474. The Court stated:

In imposing sanctions, . . . [the District Judge] appears to have applied an "objectively reasonable" test to Calloway's conduct. That test, however, is appropriate only in evaluating the conduct of attorneys under Rule 11, not the conduct of parties represented by attorneys.

We believe that a party represented by an attorney should not be sanctioned for papers signed by the attorney unless the party had actual knowledge that filing the paper constituted wrongful conduct, *e.g.*, the paper made false statements or was filed for an improper purpose. . . .

We believe that where a represented party either did not knowingly authorize or participate in the filing of a paper that violated Rule 11, sanctions against that party are not appropriate. We further believe that when a party has participated in the filing of a paper signed by the attorney or has signed a paper himself but did not realize that such participation or signing was wrongful, then sanctions against the party are also not appropriate. . . .

- 854 F.2d at 1474 (citations omitted).³⁰

³⁰ Since *Calloway*, courts in the Second Circuit have applied the subjective standard to represented parties. See, *e.g.*, *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 934 (2d Cir. 1989) ("Where a party represented by an attorney is the target of a Rule 11 motion . . . the subjective good

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The Second Circuit's standard is supported by the Fed. R. Civ. P. 11 Advisory Committee Note,³¹ which explains the circumstances in which federal courts might sanction parties under Rule 11 as follows:

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See *Browning Debenture Holders' Committee v. DASA Corp.*, *supra*.

Federal Rules of Civil Procedure: Amendments to Rules, 97 F.R.D. 165, 200 (1983). In *Browning*, certain debenture holders appealed from an unfavorable judgment in a securities fraud and breach of fiduciary duty case against the defendant debenture trustee, and the trustee sought attorney's fees. *Browning* refused to impose fees against plaintiffs personally unless it could be demonstrated "that they personally were aware of or otherwise responsible for the procedural action instituted in bad faith." *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1089 (2d Cir. 1977) (emphasis added).

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faith test applies."); *Cross & Cross Properties v. Everett Allied Co.*, 886 F.2d 497 (2d Cir. 1989); *Fischer v. Samuel Montagu, Inc.*, 125 F.R.D. 391 (S.D.N.Y. 1989); *Alberts v. Wall Street Clearing Corp.*, 1989 U.S. Dist. LEXIS 7945 (S.D.N.Y. July 13, 1989); *Quadrozzi v. City of New York*, 127 F.R.D. 63 (S.D.N.Y. 1989).

³¹ Advisory Committee Notes are to be given weight in construing the federal rules. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946). See also Wright and Miller, *Federal Practice and Procedure*, Civil 2d § 1029 (1987):

In interpreting the rules, the Advisory Committee Notes are a very important source of information and should be given considerable weight. Although these Notes are not conclusive, they provide something akin to a "legislative history" of the rules, and carry, in addition, the great prestige that the individual members of the successive Committees, and the Committees themselves, have enjoyed as authorities on procedure.

The Second Circuit has interpreted the Committee's reference to *Browning* as evidence of the rulemakers' intent that represented parties should not be sanctioned for unintentional mistakes:

We believe that a party represented by an attorney should not be sanctioned for papers signed by the attorney unless the party had actual knowledge that filing the paper constituted wrongful conduct, *e.g.*, the paper made false statements or was filed for an improper purpose. The Advisory Committee stated that allocation of sanctions among attorneys and their clients was a matter of judicial "discretion" and that sanctions should be imposed on a party where appropriate under the circumstances. Fed. R. Civ. P. 11 Advisory Committee's Note to 1983 amendment. As guidance, the committee cited *Browning Debenture Holders Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977), a case holding that a represented party should not be held liable for wrongful conduct by attorneys unless the party was personally aware . . . or responsible for the conduct.

Calloway, 854 F.2d at 1474.

In the decision below, the Ninth Circuit purported to distinguish *Browning* by noting that it was an "improper purpose" (rather than a Rule 11 inquiry) case. *Business Guides v. Chromatic Communications Enters., Inc.*, 892 F.2d 802, 811 (9th Cir. 1989). (Pet. App. 19a) That is, however, precisely the point. The Advisory Committee's reference to *Browning* indicates that sanctions under Rule 11 against represented parties should be limited to conduct which otherwise would justify the imposition of attorney's fees in the exercise of the court's inherent powers — actions taken in bad faith or for an improper purpose.³²

The standard enunciated by the Second Circuit and suggested by the Rules Advisory Committee effectively balances the goal of deterrence and the problem of chilling legitimate claims or defenses. The goal is accomplished through the imposition of sanctions against parties for actions brought in

³² See discussion of courts' inherent powers, pp. 43-44, *infra*.

bad faith, for an improper purpose, or with reckless indifference to the truth,³³ but not for simple errors committed in good faith.

B. Punishing Bad Faith Is Consonant with the Goal of Promoting Equal Access to Justice and Seeking the Truth; Punishing Mistakes Is Not

So important is "equal access to justice" that the words are engraved above the entrance to this Court. People of innumerable backgrounds, from all walks of life, bring suit and are sued. Some are more sophisticated, some less so. Thus, for justice (and access to justice) to be equal, it is important to avoid erecting barriers to participation in litigation. And, notions of equality aside, unconstrained participation is important for an additional reason – we wish to arrive at the truth. If a party is deterred from participating and rendering his version of the facts, the trier of fact is deprived of important clues to that truth. *Briscoe v. LaHue*, 460 U.S. 325 (1982).

The law recognizes that the imposition of liability for conduct occurring in the courtroom is likely to deter participation. Consequently, such liability is limited to the extreme circumstances of bad faith and lying. The qualified and, in most cases, absolute immunity of parties and witnesses from civil liability for their testimony in judicial proceedings dates back to the English common law. *Cutler v. Dixon*, 4 Co. Rep. 14b, 76 Eng. Rep. 886 (Q.B. 1585); *Anfield v. Feverhill*, 2 Bulst. 269, 80 Eng. Rep. 1113 (K.B. 1614); *Henderson v. Broomhead*, 4 H.&N. 569, 578, 157 Eng. Rep. 964, 968 (Ex. 1859). As stated by one 19th-century American court, in damages suits against witnesses "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Calkins v. Sumner*, 13 Wis. 193, 197 (1860).

³³ See pp. 33-36, *infra*.

In approving the "cluster of immunities protecting the various participants in judge-supervised trials," *Briscoe*, 460 U.S. at 335, this Court has written:

The reasons for [these immunities] are also substantial. It is precisely the function of a judicial proceeding to determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be "given every encouragement to make a full disclosure of all pertinent information within their knowledge."

Id., quoting *Imbler v. Pachtman*, 424 U.S. 404, 439 (1976) (White, J., concurring). In fact, the principle is so important that in *Briscoe*, 460 U.S. at 345, this Court stated that even knowingly false testimony by public officials (in that case police officers) would be immune from sanction:

As Judge Learned Hand wrote years ago: "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949), *cert. denied*, 339 U.S. 949 (1950).

These teachings in mind, surely laypersons who sincerely "try to do their duty," should not be subject to sanction for mere negligence. *Cf. Farmer v. Arabian Oil Co.*, 379 U.S. 227, 235 (1964) ("Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be"); *McClatchy Newspapers v. Superior Court*, 189 Cal. App. 3d 961, 971, 234 Cal. Rptr. 702, 707 (1987) ("[u]nderlying the privilege is the vital public policy of affording free access to the courts and facilitating the crucial functions of the finder of fact. . . . The fears of chilled speech and

hindered justice are too much a part of our case law to be disregarded as unproved."); *Wekstein v. Romm*, 87 A.D.2d 867, 449 N.Y.S.2d 308, 309 (N.Y. App. Div. 1982) ("[t]he absolute privilege accorded statements made during . . . judicial proceedings promotes the search for truth.").

Of course, federal and state perjury laws do punish outright lying on the witness stand or in a declaration.³⁴ They do not, however, impose liability simply for being incorrect about the facts. It is ironic here that had Mr. Lambe taken the witness stand and testified *as to exactly the same facts set forth in his affidavit*, he would not have been subject to sanctions for perjury or under any other theory. See, e.g., *United States v. Watson*, 623 F.2d 1198 (7th Cir. 1980).³⁵ It

³⁴ 18 U.S.C.A. § 1621 (West 1984) provides in relevant part: Whoever —

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorized an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, *willfully* and contrary to such oath states or subscribes any material matter which he *does not believe to be true*; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury . . . *willfully* subscribes as true any material matter which he *does not believe to be true* [commits perjury].

(Emphasis added).

Cf. Cal. Penal Code § 118 (Deering 1985); N.Y. Penal Law § 210.00-.50 (McKinney 1990); Ill. Ann. Stat. ch. 38, para. 32-2 (Smith-Hurd 1989).

³⁵ In *Watson*, the Seventh Circuit approved the following jury instruction:

The defendant may not be found guilty of perjury simply because he gave testimony which is factually incorrect. He may have given incorrect testimony because of surprise, confusion, haste, inadvertence, honest mistake as to facts,

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would be anomalous to impose sanctions upon his company under the guise of a federal rule of procedure because his counsel reduced that testimony to writing.³⁶

There is an exception to the general rule that only willful misconduct in the courtroom may be punished: namely, recklessness. If a pleading is filed, or testimony given, with total indifference to its truth, such conduct is considered akin to willfulness.³⁷ In other areas of substantive law, this Court has imposed liability for reckless indifference to the truth. Thus, the "actual malice" standard for recovery in actions for defamation of public figures has been interpreted to include not only intentionally inaccurate statements but also statements made with "reckless disregard" of their truth. *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964). See also, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1985). However, this Court has made clear that in the public arena, as in the courtroom, the value of free speech counsels that the line should be drawn carefully to avoid chilling valued communication:

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carelessness or negligence. As has been said, you may not find him guilty unless you find beyond reasonable doubt that the giving of false testimony was willful, and that the other elements of the offense are present.

623 F.2d at 1206 (emphasis in original).

³⁶ And, even under perjury statutes directed at written testimony, Mr. Lambe's conduct would not be implicated because he acted in good faith, believing his affidavit to be true. See, e.g., 18 U.S.C.A. § 1621(2) (West 1984) (declaration perjurious if "willfully" false); Cal. Penal Code § 118a (Deering Supp. 1990) (defining a perjurious affidavit as one containing facts which the affiant "knows to be false"). The problem presented when a federal procedural rule conflicts with federal or state substantive law is addressed in Section D of the text at pp. 47-48, *infra*.

³⁷ Compare *People v. Agnew*, 77 Cal. App. 2d 748, 753, 176 P.2d 724, 728 (1947) (under California law, a "reckless statement which is not known to be true is perjury if in truth such averment is false.")

[W]e have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." . . . [E]ven though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require 'breathing space.' "

Falwell, 485 U.S. at 52 (citations omitted).

Similarly, securities fraud under 15 U.S.C. § 78j(b) and Rule 10b-5, 17 CFR § 240.10b-5, is limited to knowing or reckless misrepresentations or omissions. *E.g.*, *Sharp v. Cooper & Lybrand*, 649 F.2d 175 (3d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982); *see also*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1975). That is because "recklessness is considered to be a form of intentional conduct for purposes of imposing liability." *Hochfelder*, 425 U.S. at 194 n.12. However, this Court has been "quite unwilling to extend the scope of the [Exchange Act] to negligent conduct," *id.* at 214, in part because "the hazards of a business conducted on those terms are so extreme." *Id.* at 215 n.33.

Those teachings are inconsistent with the interpretation of Rule 11 adopted below. As one commentator has put it, such an interpretation of the Rule would simply be a futile and ill-advised attempt to deter "stupidity":

The message of [this] approach . . . is either "be smarter" or, at any rate, "think as I think." . . . Did the rulemakers really intend to "punish" the "abuse" of stupidity (as judges see it), and is that a worthy goal? Can stupidity be deterred by Federal Rules of Civil Procedure, and if so, will not a lot else be deterred at the same time?

American Judicature Society, *Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of*

Civil Procedure 11 19 (Burbank, Reporter 1989). If the answer is that even a remote chance exists that legitimate claims or defenses will be deterred, the line for imposing sanctions on parties should likewise be drawn at reckless conduct. Our system of justice simply cannot afford a draconian rule that would allow parties to be sanctioned for innocent or simple-minded errors.

There can be no doubt that the application of a "knowing or reckless" standard in this case would exonerate Business Guides. In fact, the Magistrate so found when he concluded that Mr. Lambe acted in good faith and with no improper purpose. (Pet. App. 39a-40a, 53a) Mr. Lambe's self-initiated efforts to verify the accuracy of the facts submitted to the court (J.A. 187-90; R.71, 38-40), as well as his review (and edit) of the supplemental declaration submitted by his counsel on the morning of the TRO hearing (J.A. 188-89) are the very antithesis of a reckless indifference to the truth. Business Guides was not sanctioned for Mr. Lambe's "recklessness" — rather, Business Guides was sanctioned because the court believed that Mr. Lambe should have been smarter: He should have "thought" (as did the Judge's law clerk) to personally telephone the businesses listed as "seeds."³⁸ As the line of

³⁸ The Court recently held in *Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456, 458-59 (1989), that a law firm may not be sanctioned under Rule 11 for the unreasonable conduct of one of its partners. In light of that decision, a question also arises about the propriety of sanctioning the client on *respondeat superior* grounds for the negligence of one of its employees. Although this precise issue was not raised below, it bears repeating that the Business Guides employees responsible for the preparation of the master seed list and for explaining (to former counsel and to the court) the significance of that list, were mid-level employees acting in good faith. (J.A. 160-73, 181-93) While it surely is inappropriate to sanction Mr. Lambe or Ms. Burdick personally for making mistakes while doing the best they could, it is equally inappropriate to visit on their employer a form of vicarious liability when there is no evidence that any senior executive at Business Guides was

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authorities cited above suggests, however, the use of a negligence-based standard is both unwarranted and likely to be ineffectual. There is little purpose in punishing those like Mr. Lambe (and his employer) for their failure to think like a law clerk. Any efficiency benefits from such a strict standard are vastly outweighed by the threat that valid assertions will be inhibited.

C. The Costs to Litigants and the Courts Associated with the Application of the Objective Standard of Reasonableness Far Outweigh the Benefits of Such a Standard

In determining the reach of Rule 11, the Court should also consider the mandate of Federal Rule 1: The rules "shall be construed to secure the just, speedy and inexpensive determination of every action." As Judge Wisdom stated in *Woodham v. American Cystoscope Co.*, 335 F.2d 551, 557 (5th Cir. 1964), "the force of this first and greatest of the Rules should not be blunted by district court's [use of] inappropriate over-rigorous sanctions." But the force of Rule 1 would be blunted by the unwarranted use of Rule 11 to require that laypersons act within the vague parameters of "objective" reasonableness. The Ninth Circuit understandably did not attempt to provide guidance for such laypersons in its opinion below, for it is difficult if not impossible to establish "minimal standards of competence" for parties. *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1474 (2d Cir. 1988), *rev'd in part sub nom on other grounds, Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456 (1989). In fact, the Ninth Circuit addressed the issue by adopting the view that objective reasonableness should vary "under the circumstances." *Business Guides v. Chromatic Communications*

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aware of their mistakes. Indeed, the record below indicates that all of the involved personnel at Business Guides believed in good faith that respondents had copied the Directory. (J.A. 180, 190, 198)

Enters., Inc., 892 F.2d 802, 810 (9th Cir. 1989). (Pet. App. 18a)

But such vague guidance requires parties to guess – and courts to decide – objective reasonableness on an *ex post*, case-by-case basis. Because the objective standard would vary from, for example, the possibly "mentally ill" litigant in *Calloway*, 854 F.2d at 1465, to the defendant with a second grade education, to the sophisticated businessperson and frequent litigant, the decision in most cases would be rendered without the benefit of useful precedent. The more than 600 decisions addressing the impact of the objective requirement of amended Rule 11 as applied to *attorneys*, Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988), is indicative of the scope of inquiry and analysis which would be required to delineate objective reasonableness for represented parties.³⁹ Such uncertainty exacerbates the already acute problem of non-uniformity under the Rule,⁴⁰ and will promote lengthy (and costly) factual inquiries in each Rule 11 proceeding. While "some variation in the application of a standard based on reasonableness" may be inevitable, *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S. Ct. 2447, 2460 (1990), such variation in the case of parties can and should be minimized through use of a good faith test. Moreover, imposing a "good faith" standard will simply shift the focus back to counsel, where it properly belongs, except in cases where parties have

³⁹ See C. Shaffer & P. Sandler, *Rule 11: Bright Light, Dim Future, in Sanctions: Rule 11 and Other Powers* 8 (2d ed. 1988) (arguing that wide disagreement over the application of putatively objective standards has undermined any advantage gained by the amended rule).

⁴⁰ See, Note, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale L.J. 901, 902, 913 (1988) (Non-uniform Rule 11 decisions "have created an impression of arbitrariness. . . . Fairness requires the legal system to apply uniform standards to those who are similarly situated.").

set out to abuse the judicial process in some cognizable fashion.⁴¹

By contrast, attempting to determine "objective reasonableness under the circumstances" will require (as in this case) precisely the type of extended "satellite" proceedings which the Rules Advisory Committee admonished courts to avoid. *Federal Rules of Civil Procedure, Amendments to Rules*, 97 F.R.D. 165, 201 (1983) (Fed. R. Civ. P. 11 Advisory Committee Note). Cf. Wright and Miller, *Federal Practice and Procedure*, Civil 2d § 1332 (1990) ("There is little question that increasing amounts of litigation over the administration of Rule 11 would frustrate one of the central, stated goals of the rule, the more effective operation of the pleading regimen." (quoting from Advisory Committee Note, 97 F.R.D. at 201)). Something has gone wrong where, as here, three full evidentiary hearings are conducted under the auspices of Rule 11, and when, in one of them, the district court's law clerk must take the stand to detail the factual investigation *he*

⁴¹ Focusing on bad faith conduct makes evident sense from a deterrent standpoint. As discussed in text, *supra*, a client may reasonably expect to profit from making knowingly false statements, or from pursuing litigation for improper purposes, such as delay or harassment. Thus, Rule 11 *should* be applied to clients who are guilty of that type of intended offense. On the other hand, it is hard to see how a party reasonably would expect to gain from being inept. Assuming that a party believes in good faith in the soundness of her position, she will expect to gain by presenting facts that are persuasive, not the opposite. Furthermore, she must pay her own costs in any event and, if she is the defendant, potentially suffer a judgment.

Thus, the legal system does enough if it focuses its "policing" attention on clients who seek to misuse the system – which is the only substantial danger they present. Lawyers can (and should, *see* note 25 and accompanying text, *supra*) be relied upon to make sure that facts are fairly disclosed and that only legitimate claims are presented by instructing well-meaning but often unsophisticated or over-zealous clients before filing and throughout the course of litigation.

undertook. (R.60, 16-18) Surely the rulemakers did not contemplate this type of proceeding, which moves beyond "satellite" proceedings and becomes, in essence, an entirely separate trial, pitting a party against both his attorney and the court (and against an undefined standard of court-imposed professionalism).

In addition to the costs involved in a particular case, the *systemic costs* associated with using an objective standard for represented parties are substantial. An expansive interpretation of the rule, as adopted by the Ninth Circuit, obviously will promote its increased invocation (or, worse, attempted invocation). After all, if there is a way to shift litigation costs to the other side or to render one's adversary "gun shy," the temptation to do so will be great – particularly if litigation resources are unequal. The added costs to litigants to comply with vague and unpredictable pre-filing requirements, as well as the added costs to courts which, perforce, will be called upon to address more and more sanction requests,⁴² are incommensurate with the tenuous benefits⁴³ of such an expanded approach to the rule. That is particularly true since counsel remain subject to sanctions if their conduct falls below expected levels of competence – which is what ought to animate the proper use of Rule 11 in all events. *See* Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1025 (1988) (suggesting that "with the focus not on what the parties are doing to each other but on whether the lawyers are abusing the litigation process, rule 11 enforcement will move from private compensation to serving the larger interest of the judicial process.").

⁴² For instance, use of an objective standard may portend the routine accompaniment of Rule 56 motions with a request for sanctions under Rule 11. After all, summary judgment under the federal rules requires a finding that the uncontested (or irrefutable) facts do not support an asserted claim or defense as a matter of law. *E.g. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). But shouldn't uncontested facts have been apparent at the outset or at least after limited discovery?

⁴³ *See* pp. 21-30, *supra*.

D. A Rule of Procedure Imposing Sanctions on Laypersons for Negligent Mistakes Would Exceed Both the Inherent Authority of the District Courts and the Power Delegated to this Court by Congress under the Rules Enabling Act

Interpreting Rule 11 to permit represented parties to be sanctioned for good faith mistakes would violate the Rules Enabling Act.⁴⁴ Specifically, petitioner submits that the outer limits of this Court's independent power to establish rules affecting the incentives and burdens of litigation are (a) its inherent power to regulate the conduct of litigation, a power which has been held to be confined to intentional or bad faith conduct, *e.g.*, *Roadway Express v. Piper*, 447 U.S. 752 (1980), and (b) its power to establish professional standards of conduct for the bar in matters pending in federal court.

Rule 11, as interpreted below, transgresses those limits in two respects: *First*, it reallocates the costs and risks of litigation in a manner not approved by Congress including, but not limited to, the *de facto* approval of fee-shifting beyond the limits authorized by Congress; *second*, it effectively creates a federal tort of negligent litigation practice and/or expands existing state statutory or common law torts of malicious prosecution and abuse of process.

As we have explained above, there simply is no need to interpret Rule 11 to reach negligence by represented parties in

⁴⁴ The Enabling Act provides:

- (a) The Supreme Court shall have the power to prescribe general rules of *practice and procedure*. . . .
- (b) Such rules shall *not abridge, enlarge or modify any substantive right*.

28 U.S.C.A. § 2072 (West Supp. 1990) (emphasis added). The Act sets forth two separate limitations on the rulemaking powers delegated by Congress to the Court. *First*, the Court cannot promulgate substantive laws. *Second*, any rules promulgated (whether considered substantive or procedural), may not alter existing substantive rights. *See Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987).

order to adequately regulate the conduct of litigation. So long as courts have plenary power over the federal bar and may sanction any conduct which is carried out (by counsel or by a party) in knowing or reckless disregard of their litigation responsibilities, no legitimate regulatory or process function is served by permitting courts to sanction the good faith actions of represented parties. Doing so can be justified only as a decision to alter the litigation risk/reward calculus – a function heretofore scrupulously and appropriately left to the legislative branch. *See Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Roadway Express*, 447 U.S. at 759-61.

1. Rule 11 as Interpreted by the Ninth Circuit Reallocates the Costs and Risks of Litigation in a Manner Not Authorized by Congress

Our argument that Rule 11, as construed below, violates the Enabling Act proceeds from two premises which we believe to be clearly established: *First*, that it is the prerogative of the legislative, not the judicial, branch to establish and allocate the "burdens of litigation", *Alyeska*, 421 U.S. at 247, including, specifically, the imposition of costs in the form of attorneys' fees, *id.*; and, *second*, that the "inherent power" of a court to impose sanctions in the form of dismissal (*Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962)) or costs (*Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)), is restricted to instances of bad faith or other similar/willful conduct. *Roadway Express*, 447 U.S. at 765-66; *Hall v. Cole* 412 U.S. 1 (1973); *Zambrano v. City of Tustin*, 885 F.2d 1473, 1478 (9th Cir. 1989).

From those two underlying principles, we take it also to be settled that while courts plainly have the authority to regulate the *process* of litigation, *see, e.g.*, 28 U.S.C. § 2072, that power is still constrained by principles of separation of

powers⁴⁵ and by the limits of what is actually *necessary* to regulate the conduct of practice before the federal courts. It is no answer to those observations to recognize that this Court has been delegated the power to establish rules of procedure – which it plainly has – or even that Rule 11 is, in general, a valid exercise of that authority. *See generally, Sibbach v. Wilson*, 312 U.S. 1 (1941); *Hanna v. Plumer*, 380 U.S. 460 (1965). Despite the authority of the Rules Enabling Act, we think it clear that the Court could not simply establish a rule, for example, creating a routine right to attorneys' fees for parties prevailing on a summary judgment motion. *Compare Alyeska*, 421 U.S. at 240.⁴⁶ The reason is not that such a rule

⁴⁵ As the Court recently observed in *Mistretta v. United States*, ___ U.S. ___, 109 S. Ct. 647, 658 (1989):

This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.

In *Mistretta*, the Court upheld the constitutionality of sentencing guidelines promulgated by the Sentencing Guidelines Commission pursuant to a specific delegation of power by Congress under the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551 *et seq.* In large part, the Court's decision was based on the fact that the "powers [of the Sentencing Commission] are not united with the powers of the Judiciary in a way that has meaning for separation of powers analysis." 109 S. Ct. at 665. Indeed, the Court noted that it would "express no opinion about whether, under the principles of separation of powers, Congress may confer upon a court rulemaking authority such as that exercised by the Sentencing Commission." *Id.* at 666 n. 20 (emphasis added). Here, rulemaking authority is exercised by the Court under the Enabling Act, not by an independent agency, and thus, unlike *Mistretta*, the proper authority of the Branches is directly at issue.

⁴⁶ Similarly, we question whether it would be permissible for this Court, by rule, to create or abrogate state-created attorneys' fee provisions in diversity cases. *Alyeska*, 421 U.S. at n.31. *See also, People of Sioux County v. National Surety Co.*, 276 U.S. 238, 243 (1928).

could not be articulated as a matter involving process values, *compare, Hanna* 380 U.S. at 463-66, but that its implementation would so plainly alter the relationship of litigation benefits and burdens – a matter that has been recognized as peculiarly legislative. *Alyeska*, 421 U.S. at 247; *compare Kaiser Aluminum & Chem. Co. v. Bonjorno*, ___ U.S. ___, 110 S. Ct. 1570, 1576 (1990).⁴⁷

The fact that courts have been held to possess certain "inherent powers" over the conduct of litigation is entirely consistent with our point. Those powers, as this Court has observed, are limited to matters that are necessary "to the exercise of the judicial function" (*United States v. Hudson*, 7 Cranch 32, 34 (1812)) or to actions which a judge must take to protect "the due and orderly administration of justice and . . . the authority and dignity of the courts" *Cooke v. United States*, 267 U.S. 517 (1925). "Because inherent powers are shielded from direct democratic controls, they must be employed with restraint and discretion." *Roadway Express*, 447 U.S. at 764. In *Roadway Express*, this Court recognized that the use of such powers to impose sanctions in the form of fees would appear to be contrary to the Court's holding in *Alyeska*. The Court held, however, that "that rule does not apply when the opposing party has acted in bad faith." *Roadway Express*, 447 U.S. at 765-66. The Court, in fact, quoted a

⁴⁷ Permitting this kind of "fee shifting" would also alter balances struck by Congress in deciding whether and how to permit the imposition of fees in particular circumstances. *See e.g., Hays v. Sony Corp. of America*, 847 F.2d 412, 418 (7th Cir. 1988) (Rule 11 no more a "fee-shifting statute" than it "defines a new form of legal malpractice"); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987) ("Rule 11 should not be viewed as a general fee shifting device."). *See also, Bradley v. School Board*, 416 U.S. 696 (1974); *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968).

The availability of attorneys' fees to certain copyright litigants at the discretion of the court is not relevant to the analysis here. Whether or not Rule 11 may be invoked against parties acting in good faith cannot be dependent on the nature of the particular underlying claim. *Cf. Roadway Express*, 447 U.S. at 752, where the Court specifically noted that it would be inappropriate to import statute-specific considerations into the substance-neutral provisions of 28 U.S.C. § 1927.

portion of its opinion in *Alyeska* which had acknowledged the "inherent" judicial power to

assess attorneys' fees for the "willful disobedience of a court order . . . as part of the fine to be levied on the defendant" . . . ; or when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons"

421 U.S. at 258-59 (citations omitted).

The court in *Roadway* further noted the existence of an additional "bad-faith exception" for the award of attorneys' fees and observed that such "bad faith" can "be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." 447 U.S. at 766 (citing *Hall v. Cole*, 412 U.S. 1, 15 (1973), and, significantly, *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1088 (2nd Cir. 1977)).⁴⁸

Thus, while inherent powers exist to control litigation abuse, interpreting Rule 11 to "reallocate the burdens of litigation" through the imposition of fees or dismissal in circumstances which would not be permissible under *Alyeska* or *Roadway* would, we submit, run afoul of this Court's authority. In saying that, we are, of course, mindful of decisions broadly construing the judicial power to control the orderly course of litigation through the imposition of sanctions for both deterrent and punitive purposes. See, e.g., *National Hockey League v. Metropolitan Hockey Club*, 427

⁴⁸ The reference by the Rules Advisory Committee to *Roadway* and *Browning* is similarly instructive. In its own discussion of the authority of the courts to sanction under Rule 11, the Rules Advisory Committee cited *Roadway* as establishing the courts' inherent power to "award expenses, including attorney's fees to a litigant whose opponent acts in bad faith in instituting or conducting litigation." *Federal Rules of Civil Procedure, Amendments to Rules*, 97 F.R.D. 165, 198 (1983). In some cases, the Committee sought to "expand" on this "equitable doctrine." *Id.* But the Committee's subsequent citation to *Browning* as the example of when sanctions against the client are appropriate under Rule 11, 97 F.R.D. at 200, indicates that, in the case of represented parties, it did not intend to expand the good faith limitation on the court's equitable powers. See pp. 28-29, *supra*.

U.S. 639, 642-43 (1976). However, it has never been perceived that such sanctions may be applied – notwithstanding the unequivocal language of, for example, Rule 37 – without regard to appropriate prudential limitations. Indeed, *Metropolitan Hockey Club*, which is frequently cited as the high water mark of judicial authority to impose sanctions under the federal rules,⁴⁹ was careful to endorse this Court's earlier holding in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), that Rule 37 may not

be construed to authorize dismissal of [a] complaint because of petitioner's noncompliance with a pre-trial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

357 U.S. at 212; *Metropolitan Hockey Club*, 427 U.S. at 640.

In fact, review of the court's opinion in *Societe Internationale*, suggests that the quoted limitations were not matters of mere interpretation but, at least in the case of dismissal, had potentially constitutional significance. 357 U.S. at 209-210.⁵⁰

⁴⁹ *Metropolitan Hockey Club* has no direct applicability to this case. There, the Court held that a district court did not abuse its discretion in dismissing an action under Rule 37, where it had expressly found "respondents' flagrant bad faith and their counsel's callous disregard of their responsibilities." 427 U.S. at 643 (emphasis added). Not only is such egregious conduct absent here, but the court found that Business Guides (and its counsel) acted in complete good faith. (Pet. App. 39a-40a, 53a) To petitioner's knowledge this Court has never approved dismissal where a party has acted in good faith.

⁵⁰ It is not clear whether *Societe Internationale* stands for the proposition that the federal rules may not be used for the purpose of punishment (i.e., sanctions) in the case of good faith conduct. The case is capable of being read as addressing only a question of "inability" to comply. However, the Court referred several times to the petitioner's good faith, 357 U.S. at 208, 209, and further stated that the "willfulness or good faith" of the petitioner was pertinent in determining the availability of sanctions. *Id.* at 208. Business Guides submits that *Societe*

Business Guides submits that the issue here is easily – and best – solved through interpretation. However, a view of the rule that would permit courts to sanction good faith negligent conduct exceeds the bounds of this Court's authority.⁵¹

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Internationale should be read, consistent with the arguments made in text, *supra*, as holding that a good faith failure (not brought about by indifference or recklessness) is akin to "inability" to comply. In both instances, the party's failure is not brought about by a desire to impede the efficient search for truth but in the one case by limitations placed upon it by others and, in the case at bar, by the limitations of its own foresight. Stated otherwise, and as we have noted elsewhere, "Be smarter" is not a useful command for any legitimate purpose of compliance or deterrence. See text at p. 34, *supra*.

⁵¹ The imposition of sanctions against negligent counsel does not raise the same problem, due to the Court's incontestable powers over attorneys. *Theard v. United States*, 354 U.S. 278, 281 (1956) ("the two judicial systems of courts, the state judiciaries and the federal judiciary, have autonomous control over the conduct of their officers . . ."). See also Wright and Miller, *Federal Practice and Procedure*, Civil 2d § 1332 (1990), quoting *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985) ("[I]t is Congress' judgment that the district judge has primary responsibility to police [attorneys in federal court]" (emphasis in original)); Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 U. Conn. L. Rev. 7, 21 (1987) ("Because it is extremely difficult for the bar to enforce ethical rules in the litigation context, efforts to restrain abuse must take place in the courts, through the exercise of supervisory authority over the litigation process.")

Accordingly, courts have held that lawyers may be sanctioned under the amended Rule for negligent conduct. E.g., *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987); *Brown v. McGarr*, 774 F.2d 777, 781-82 (7th Cir. 1985). Rule 11, in this context, simply becomes the mechanism to judicially supervise and enforce Model Code of Professional Responsibility DR 7-102 (1980) and Model Rules of Professional Conduct, Rule 3.1 (1989). No such power or policy considerations justify the imposition of sanctions against represented parties.

2. Interpreting Rule 11 to Permit the Award of Sanctions in the Form of Fees, Costs or Dismissal Would Abridge or Enlarge Substantive Rights

Under the Enabling Act, Rule 11 may not be interpreted to alter existing laws. *Burlington Northern*, 480 U.S. at 5.⁵² But the application of Rule 11 adopted by the Court of Appeals would alter an extensive and developed body of federal and state substantive rights and obligations. These laws prohibit the imposition of sanctions for litigation conduct that is merely negligent. For example, witness immunity laws provide absolute immunity from civil suits based on inaccurate testimony.⁵³ More important, state tort laws involving conduct in judicial proceedings (e.g. malicious

⁵² In *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984), the petitioner argued that the demand requirement of Rule 23.1 created substantive rights. Although the majority did not reach the issue, Mr. Justice Stevens, in a concurring opinion, stated that since the Rule "does not clearly create such a substantive requirement by its express terms, it should not be lightly construed to do so and thereby alter substantive rights." *Id.* at 544 n.2 (Stevens, J., concurring) (citations omitted). See also, *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 446 (1946) (Rule 4(f) "relates merely to the manner and the means by which a right to recover . . . is enforced. . . ."); *Burlington Northern*, 480 U.S. at 8 (Rule 38 "affects only the process of enforcing litigants' rights and not the rights themselves.").

Similarly, this Court should not "lightly construe" Rule 11 to accord litigants the right to attorneys' fees and/or other "sanctions" in the guise of a procedural rule. Indeed, it is generally accepted that the award of attorneys' fees is a substantive rather than procedural right, and therefore a matter of legislative rather than judicial prerogative under the first clause of the Enabling Act. *Alyeska*, 421 U.S. at 260-262; see also, *Marek v. Chesny*, 473 U.S. 1, 35 (1984) (Brennan J., dissenting) ("The right to attorneys' fees is 'substantive' under any reasonable definition of that term.").

⁵³ See pp. 30-32, *supra*.

prosecution⁵⁴ or abuse of process⁵⁵), generally require proof of bad faith in order to recover damages. And, statutes allowing fee-shifting likewise specifically require willful misconduct or bad faith.⁵⁶ A rule which effectively permits fee-shifting in the form of Rule 11 or other sanctions against a party acting in good faith plainly "alters" (and in fact directly conflicts with) these substantive principles. Accordingly, Rule 11 as interpreted by the Ninth Circuit fails the Enabling Act and hence exceeds the powers of the Court.

⁵⁴ See, e.g., *Berman v. Silver, Forrester & Schisano*, 549 N.Y.S.2d 125 (N.Y. App. Div. 1989); *Equity Assoc., Inc. v. Village of Northbrook*, 171 Ill. App. 3d 115, 524 N.E.2d 1119 (1988); *Interiors v. Petrak*, 188 Cal. App. 3d 1363, 234 Cal. Rptr. 44 (1987) (All requiring proof of malice in claim for malicious prosecution).

⁵⁵ See, e.g., *Berman v. Silver, Forrester & Schisano*, 549 N.Y.S.2d 125 (N.Y. App. Div. 1989); *Lander v. Schneider*, 154 Ill. App. 3d 875, 506 N.E.2d 735 (1987); *Coleman v. Gulf Ins. Group*, 41 Cal. 3d 782, 718 P.2d 77, 226 Cal. Rptr. 90 (1986) (All requiring proof of ulterior motive for abuse of process claim).

⁵⁶ See, e.g., 28 U.S.C.A. § 1927 (West Supp. 1990) which provides:

Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The imposition of costs under Section 1927 requires a finding of bad faith or willfulness. *Williams v. Giant Eagle Markets, Inc.*, 883 F.2d 1184, 1191 (3d Cir. 1989); *Estate of Blas Through Chargualaf v. Winkler*, 792 F.2d 858, 860 (11th Cir. 1986). Cf. Cal. Civ. Proc. Code § 128.5 (Deering Supp. 1990); N.Y. R. Trial Cts. § 130-1.1.

CONCLUSION

For the foregoing reasons, petitioner requests that the decision below be reversed.

Respectfully submitted,

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